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Extracts

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 110.

THE LYCOMING FIRE-INSURANCE COMPANY OF MUNCY, PENNSYLVANIA, PLAINTIFF IN ERROR,

vs.

SAMUEL R. HAVEN, JANE S. HAVEN, GEORGE W. JOHNSON, MARY E. JOHNSON, S. G. W. BENJAMIN, CLARA BENJAMIN, EDWARD L. STOWELL, JOHN ROPER, AND F. B. STOWELL, BY S. [illegible] NEXT FRIEND.

PHILADELPHIA BAR ASSOCIATION

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge, sitting pro tempore in the absence of the Hon. Thomas Drummond, circuit judge, on Tuesday, the twentieth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the ninety-ninth year.

WILLIAM H. BRADLEY, *Clerk.*

SAMUEL RUSH HAVEN, JANE S. HAVEN, GEORGE W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend, *vs.* LYCOMING FIRE-INSURANCE COMPANY OF MUNCY, Pennsylvania.	Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered that on the 27th day of April, A. D. 1874, came the said defendant, the Lycoming Fire-Insurance Company of Muncy, Pennsylvania, by Lawrence Proudfoot, its attorney, and filed in the office of the clerk of the circuit court of the United States for said district, at Chicago, in the district aforesaid, its bond for costs, together with a transcript of the record and proceedings had in the superior court of Cook County, State of Illinois, in said entitled cause; which said bond for costs and transcript of record are in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, May term, A. D. 1874.

HAVEN ET AL. *vs.* THE LYCOMING FIRE-INSURANCE COMPANY.	In assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the defendant of any costs ordered or adjudged to be paid by it, I hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this 27th day of April, A. D. 1874.

GEO. P. TREADWAY.

3 (Endorsed:) Filed April 27, A. D. 1874. W'm H. Bradley, clerk.

Transcript of record.

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the honorable the judges of the superior court of Cook County, in the State of Illinois, at a regular term of said superior court

of Cook County, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the second day of March, in the year of Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth.

Present, the honorable Joseph E. Gary, chief-justice of the superior court of Cook County, and John A. Jameson, Samuel M. Moore, judges.

Present also the honorable John Burns, judge of the twelfth judicial circuit; Charles H. Reed, prosecuting attorney; T. M. Bradley, sheriff of Cook County.

Attest: ALEXANDER F. STEVENSON, *Clerk.*

Be it remembered that heretofore, to wit, on the twelfth day of December, in the year of our Lord one thousand eight hundred and seventy-one, Samuel Rush Haven et al., by Hervey, Anthony and Galt, their attorneys, filed in the office of the clerk of the superior court
4 of Cook County their certain præcipe for summons and bond for costs; which are in words and figures as follows, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

The superior court of Cook County, January term, A. D. 1872.

SAMUEL RUSH HAVEN, JANE S. HAVEN, GEORGE W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, and Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend, plaintiffs, *vs.* LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Pennsylvania, defendant.	Assumpsit. Damages, $6,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case upon promises to the damage of said plaintiffs in the sum of six thousand dollars, direct the same to the sheriff of Cook County to execute, and make it returnable to the January term of said court, A. D. 1872.

Chicago, Dec. 11th, 1872.

HERVEY, ANTHONY & GALT,
Plaintiffs' Attorney.

To , *Clerk.*

5 STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County.

SAMUEL R. HAVEN ET AL. *vs.* LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Pennsylvania.	

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which

may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State.

Dated this 12th day of December, A. D. 1871.

HERVEY, ANTHONY & GALT.

And thereupon, to wit, on the day and year last aforesaid, there issued out of said clerk's office the people's certain writ of summons; which said writ, with the return of the sheriff endorsed thereon, is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Cook County, ss:

The people of the State of Illinois to the sheriff of said county, greeting

We command you to summon Lycoming Fire-Insurance Company of Muncy, Pennsylvania, if it shall be found in your county,
6 personally to be and appear before the superior court of Cook County, on the first day of the term thereof, to be holden at the court-house, (high-school building,) in Chicago, in said county of Cook, on the first Monday of January next, to answer unto Samuel Rush Haven, Jane S. Haven, George W. Johnson, Mary C. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, and Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend, in a plea of trespass on the case upon promises, to the damage of said plaintiffs, as is said, in the sum of six thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Augustus Jacobson, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 12th day of December, A. D. 1871.

[SEAL.] A. JACOBSON, *Clerk.*

(Endorsed:) The president of the within-named company not being a resident of this county, I have served the within writ by reading and delivering a copy of the same to Edwin W. Jewell, an agent of said company, this 19th day of December, 1871.

T. M. BRADLEY, *Sheriff,*
By H. B. GALPIN, *Deputy.*

Fees:

1 copy,	50
Service,	50
Mileage,	10
Return,	10
	1.20

P'd by pl'ffs' att'y.

7 And afterwards, to wit, on the twenty-fifth day of January, in the year last aforesaid, said plaintiffs, by their attorneys aforesaid, filed in said clerk's office their certain declaration; which (with a certain stipulation thereto attached) is in the words and figures following, to wit:

The superior court of Chicago, of the January term, 1872.

SAMUEL R. HAVEN ET AL.
vs.
LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Penn'a.

It is hereby stipulated by and between the parties hereto that the said plaintiffs may prove any claim they may have against the said defendant under the common counts, the same as if they had specially declared on the policy issued to plaintiffs and made all the necessary averments; and that the said defendant may prove any defence it may have to a recovery on said policy under the general issue, in the same way as if they had set out their defence in special pleas.

Jan'y 23d, 1872.

HERVEY, ANTHONY & GALT,
Att'ys for the Plaintiff.
LAWRENCE PROUDFOOT,
Att'y for Defendant.

STATE OF ILLINOIS,
Cook County, ss:

In the superior court of Cook County, of the January term, A. D. 1872.

Samuel Rush Haven, Jane S. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, and Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend, plaintiffs in this suit, by Hervey, Anthony and Galt, their attorneys, complain of the Lycoming Fire-Insurance Company of Muncy, Pennsylvania, defendant in this suit, who has been summoned to answer the plaintiffs of a plea of trespass on the case on promises:

For that whereas the said defendant heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and seventy-one, at, to wit, Cook County aforesaid, became and was indebted to the said plaintiffs in the sum of six thousand dollars of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the defendant, and to the special instance and request of the said defendant, and being so indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, to wit, Cook County, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiffs had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiffs, the said defendant then and there undertook and faithfully promised the said plaintiffs that the said defendant would well and truly pay to the said plaintiffs so much money as the last aforesaid goods, wares, and merchandise at the time of sale and delivery thereof were reasona-

bly worth when the said defendant should be thereunto afterwards requested.

And the said plaintiffs aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of six thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiffs in the further sum of six thousand dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And in the like sum
10 for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And in the like sum for other money before that time and then due and owing the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiffs. And in the like sum for the price and value of work then done and material for the same provided by the plaintiffs for the defendant and at the like special request of the defendant.

And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, to wit, Cook County, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of six thousand dollars of the like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, and the said defendant in con-
11 sideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc.) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs in the large sum of six thousand dollars; and therefore the said plaintiffs bring suit, etc.

HERVEY, ANTHONY & GALT.
Plaintiffs' Attorneys.

Copy of the account sued on.

Lycoming Fire-Insurance Company to , D'r:

To money lent and advanced	$6,000
To money paid, laid out, and expended	$6,000
To money had and received to and for the use of said plaintiff.	$6,000
To goods, wares, and merchandise sold and delivered	$6,000
To labor, services, and material	$6,000
To balance due on account stated, and interest	$6,000
To amount claimed under policy	$3,000

12 And afterwards, to wit, on the second day of February, in the year last aforesaid, said defendant, by Lawrence Proudfoot, its attorney, filed in said clerk's office its certain plea and affidavit of merits; which are in words and figures as follows, to wit:

STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County, January term, A. D. 1872.

SAMUEL R. HAVEN ET AL.
vs.
THE LYCOMING FIRE-INS'CE COMP'Y OF Muncy, Pennsylvania.

And the said defendant, by Lawrence Proudfoot, its attorney, comes and defends the wrong and injury, &c., and says that it did not undertake or promise in manner and form as is above thereof alleged against it; and of this it puts itself upon the country.

LAWRENCE PROUDFOOT,
Att'y for Defend't.

SAMUEL B. HAVEN, JANE S. HAVEN, GEORGE W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adaline Roper, and Fred. B. Stowell, by Samuel R. Haven, his next friend,
vs.
THE LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Pennsylvania.

13 Superior court of Cook County.

STATE OF ILLINOIS,
Cook County, ss:

George P. Treadway, being duly sworn, deposes and says that he is the agent of the Lycoming Fire-Insurance Company of Muncy, Pennsylvania, in the city of Chicago, and that said company has a good and substantial defence in the above-named suit upon the merits.

GEO. P. TREADWAY.

Subscribed and sworn to before me this 21st day of December, 1871.

LAWRENCE PROUDFOOT,
Notary Public.

And afterwards, to wit, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and seventy-three, the same being one of the days of the June term of the superior court of Cook County, the following among other proceedings were had in said court and entered of record, to wit:

SAMUEL RUSH HAVEN ET AL.
vs.
LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Pennsylvania. } 215. Assumpsit.

36715.

This day again come the parties to this suit, by their attorneys aforesaid, and thereupon, on the agreement of the parties now here, made in open court, it is ordered by the court that this suit be, and the same is hereby, passed.

14 And afterwards, to wit, on the ninth day of March, in the year of our Lord one thousand eight hundred and seventy-four, said defendant, by its attorney aforesaid, filed in said clerk's its certain petition and bond for removal; which are in words and figures as follows, to wit:

Superior court of Cook County.

STATE OF ILLINOIS,
Cook County, ss:

SAMUEL R. HAVEN, JANE S. HAVEN, GEORGE W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Rupee, Adeline Rupee, Frederick B. Stowell, by his next friend, Samuel R. Haven,
vs.
THE LYCOMING FIRE-INSURANCE COMPANY of Muncy, Pennsylvania.

James M. Bowman, being duly sworn, deposes and says that he is the secretary of and for the above-named company, defendant; that as such secretary he has charge and superintendence and management of the business and affairs of said company in said State of Illinois; that there is now pending in this court a suit against the said Lycoming Fire-Insurance Company, wherein the above-named Samuel R. Haven and others are plaintiffs; that said plaintiffs are, as this deponent is informed, citizens and residents of said State of Illinois; that
15 the said Lycoming Fire-Insurance Company is a corporation created, existing, and doing business under and by virtue of the laws of State of Pennsylvania; that none of the officers or directors of said company are citizens or residents of the State of Illinois, and that said defendant company is not a citizen of the State of Illinois, but is a citizen of the State of Pennsylvania; that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

That this defendant has reason to and does believe that, from prej-

udice and local influence, the said defendant will not be able to obtain justice in this court, and that this affidavit is made by this deponent on the behalf and as secretary of said Lycoming Fire-Insurance Company as aforesaid; wherefore the said defendant prays that the said suit be removed from this court into the United States circuit court for the northern district of Illinois.

JAMES M. BOWMAN.

Subscribed and sworn to before me this 7th day of February, 1874.
[SEAL.] S. P. WALKER,
Notary Public.

STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County.

SAMUEL R. HAVEN ET AL.
vs.
THE LYCOMING FIRE-INS. CO., MUNCY, PENN.

16 The petition of the above-named defendant respectfully represents that it is a citizen of the State of Pennsylvania; that the above-named plaintiffs are citizens and residents of the State of Illinois; that the above-entitled suit is pending against the defendant in the circuit court of Cook County, and that the sum in controversy exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner therefore prays, upon the affidavit and bond filed herewith, that said cause be transferred to the United States circuit court for the northern district of Illinois.

LYCOMING FIRE-INS. CO.,
By JAMES M. BOWMAN, *Sec'y.*
LAWRENCE PROUDFOOT,
Att'y for Defend'ts.

STATE OF ILLINOIS,
Cook County, ss:

Circuit court, Cook County.

SAMUEL R. HAVEN, JANE S. HAVEN, ET ALS.,
vs.
THE LYCOMING FIRE-INS. COMPANY OF Muncy, Pennsylvania.

Know all men by these presents, that the Lycoming Fire-Insurance Company of Muncy, Pennsylvania, and George P. Treadway, of Chicago, in said county and State, are held and firmly bound unto the above-named Samuel R. Haven et als. in the penal sum of five hundred dollars, for the payment of which sum, well and truly to be made,
17 we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, firmly by these presents. Witness our hands and seals this seventh day of February, A. D. 1874.

The condition of this obligation is such that whereas the above-bounden Lycoming Fire-Insurance Company has made application to transfer the above-entitled cause to the United States circuit court for the northern district of Illinois from said circuit court of Cook County:

Now, therefore, if the above-bounden, The Lycoming Fire-Insurance Company, shall, on or before the first day of the next session of the United States circuit court, enter copies of all process in said cause against it, and of all pleadings, depositions, and testimony, and other proceedings in said cause affecting or concerning said defendant, and shall also appear in said court and enter special bail therein, (if special bail shall be required,) then this obligation to be void; otherwise to remain in full force and virtue.

LYCOMING FIRE-INS. CO., [SEAL.]
By JAMES M. BOWMAN.
GEO. P. TREADWAY, *Sec'y.* [SEAL.]

And afterwards, to wit, on the ninth day of March, in the year last aforesaid, the same being one of the days of the March term of the
18 superior court of Cook County, the following among other proceedings was had in said court and entered of record, to wit:

SAMUEL RUSH HAVEN ET AL.
vs. } 215.
LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Pennsylvania.

36715.

This day again come the parties to this suit, by their attorneys aforesaid, and thereupon the defendant files herein its petition, based upon affidavit filed for the removal of said cause into the United States circuit court in and for the northern district of the State of Illinois.

And it appearing to the court that the said defendant has filed herein its bond conditioned according to the act of Congress in such case made and provided, it is ordered by the court that this cause be, and the same is hereby, transferred to the said United States circuit court; and that the clerk of this court do forthwith transmit to said United States circuit court a complete transcript of all papers and pleadings filed in said cause, together with all orders of court made and entered of record therein.

STATE OF ILLINOIS,
Cook County, ss:

I, Alexander F. Stevenson, clerk of the superior court of Cook County, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of all papers
19 and pleadings now on file in my office, and of all orders made and entered of record in said court in a certain cause lately pending in said court, on the common-law side thereof, wherein Samuel Rush Haven et al. were plaintiffs and the Lycoming Fire-Insurance Company of Muncy was defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this eleventh day of March, A. D. 1874,

[SEAL.] A. F. STEVENSON, *Clerk.*

(Endorsed:) Filed April 27, 1874. W'm H. Bradley, cl'k.

And afterwards, to wit, on the 1st day of April, A. D. 1875, in the adjourned March term of said circuit court of the United States, in the

record of the proceedings thereof in said entitled cause is the following entry, to wit:

SAMUEL R. HAVEN ET AL.
vs.
THE LYCOMING FIRE-INSURANCE COMPANY. } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: James D. Tyler, S. W. Morse, D. J. Pinkney, A. J. Flack, William Jameson, G. L. S.
20 Stuff, A. Reynolds, S. B. French, Thomas McArthur, Edward Manierre, William P. Hewett, and C. F. Adams, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 2nd day of April, A. D. 1875, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SAMUEL R. HAVEN ET AL., &C.,
vs.
THE LYCOMING FIRE-INSURANCE COMPANY. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanelled and sworn, and after hearing the concluding evidence and the arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess his damages to the sum of thirty-seven hundred and thirty dollars. And thereupon the defendant, by its attorney, moves the court for a new trial herein.

And afterwards, to wit, on the 20th day of April, in the said
21 adjourned March term, A. D. 1875, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SAMUEL RUSH HAVEN, JANE S. HAVEN, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend,
vs.
LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Pennsylvania. } Assumpsit.

The court having considered, and being now fully advised upon, the motion of the defendant heretofore entered herein for a new trial of this cause, overrules the same. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of thirty-seven hundred and thirty dollars, their damages so as aforesaid assessed, together with their costs and charges in this behalf expended, amounting to the sum of thirty-six dollars and seven cents; and that they have execution therefor.

And afterwards, to wit, on the 30th day of April, A. D. 1875, the following exceptions, taken and allowed by the court and made of record in said cause, were filed in said clerk's office, and are in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

22 In the circuit court of the United States for the northern district of Illinois.

SAMUEL RUSH HAVEN, JANE S. HAVEN, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend,	In assumpsit.
vs.	
LYCOMING FIRE-INSURANCE COMPANY OF Muncy, Pennsylvania.	

Be it remembered that on the trial of the above-entitled cause, at this term, this second day of April, A. D. 1875, the plaintiffs, to maintain the issue on their part, offered and read in evidence a policy of insurance from the defendant to James S. Haven, Mary E. Johnson, Clara Benjamin, Edward L. Stowell, Adeline Stowell, Frederick B. Stowell, and S. R. Haven, agent, dated May 9th, 1870, insuring the parties named therein for the term of one year from its date, against loss or damage by fire, to the amount of three thousand dollars, viz, three hundred dollars on each of ten buildings known as numbers 538 to 556, South Clark street, Chicago, Illinois. (No point was made upon the variance between names of plaintiffs and those named in the policy, it being admitted that the apparent variance in names was occasioned by the marriage of some parties after the issue of the policy.)

23 This policy was in the usual form of policies of insurance issued by the defendant, and provided that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of the policy; otherwise the policy shall be void."

It further provided that "the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

Also that "this policy is made and accepted in reference to the foregoing terms and conditions, which are declared to be a part of the contract, and to be used and resorted to in order to determine the rights and obligations of the parties to the policy."

It was admitted that the plaintiffs were the owners in fee of the land on which the buildings insured stood.

Nothing was expressed in the written part of the policy indicating or tending to indicate that the interest of the assured in the property purporting to be insured thereby was any other than the entire, uncondi-

tional, and sole ownership of such property for the use and benefit of the assured, or indicating, or tending to indicate, that the buildings insured stood on leased ground 24 nor was any evidence offered tending to show that any representation was ever made to the company prior to the fire that the interest of the assured in the property purporting to be insured by said policy was any other than the entire, unconditional, and sole ownership of such property for the use and benefit of the assured, or that the buildings insured stood on leased ground.

The plaintiffs then offered and read in evidence to the jury proofs of loss, which it was admitted were made under the policy in due form, and which showed that the buildings described in the policy were destroyed by fire December 30, 1870, and stated that the property insured by said policy belonged to the plaintiffs, subject to the interest of C. P. McKay therein, as shown by a contract or lease recorded in the recorder's office of Cook County, Illinois, (describing it.) It was admitted that the fire caused a total loss of the said buildings, and that the value of the building' exceeded the amount of the insurance.

The plaintiffs then offered and read in evidence to the jury the contract referred to in the proofs of loss, being a lease of the land and the buildings and improvements to be built thereon, as thereinafter agreed upon and described, on which the insured buildings were situated, from the plaintiffs, as owners of the ground, to one Charles P. McKay, dated November 21st, 1867, for a term of years from May 1, 1868, to 25 May 1, 1878, at a rental of $3,588.00 per annum and all taxes and assessments for the first five years, and $5,976.00 per annum and all taxes and assessments for the second five years.

But if lessors shall deem rate of rent so fixed for second five years too high or too low, they may, ninety-five days prior to expiration of first five years, fix a rate of rent and submit same in writing to lessee. If such rate was not accepted, then arbitrators are to be selected in a way provided for in the contract, who are to appraise the cash value of the premises, exclusive of all improvements thereon, and the lessee shall pay six per cent. per annum on said appraised value and all taxes and assessments, and ten per cent. per annum on twelve thousand ($12,000) dollars, to be advanced or paid by the lessors for the purpose of erecting buildings on said leased property.

If in any case the rents shall be fixed less for the second five years than for the first five years, then the rate of rent for the first five years is to be the rate for the second five years.

By the terms of this contract, the lessee agreed in the words of the contract to at once "proceed to erect ten buildings" on the land described therein, "to cost not less than twenty-four thousand ($24,000) dollars, for the party of the first part, (lessor,) and to receive pay for the 26 same at the times and in the manner" therein described, to wit: The first $1,000.00 when $2,000.00 should have been expended on the buildings; the second $1,000.00 when $4,000.00 should have been so expended; and so on to and including the twelfth $1,000.00, when $24,000.00 should have been so expended.

The lessee agreed to insure the premises during the process of erection of the buildings, and to keep them insured for at least thirteen thousand dollars during the continuance of the lease in the name and for the benefit of the lessors, in insurance companies to be approved by them, and to deposit the policies with them. The lessee agreed to pay the lessors from May 1, 1873, ten per cent. per annum on the $12,000 to be advanced by them for the purpose of erecting buildings on the land, payable

quarterly; the lessors to have the right at any time to call for an appraisement of the buildings, and if less in value than twenty-four thousand ($24,000) dollars to determine the lease and pay the lessee the difference between such appraisal and twelve thousand ($12,000) dollars and take possession, or to require the lessee to increase the value of the buildings to twenty-four thousand ($24,000) dollars within a reasonable time; and if not done within six months, to declare a forfeiture of the lease and all the lessee's rights and interests thereunder.

It was agreed that the lessee should rebuild, in case of fire, buildings of the value of twenty-four thousand dollars, and should receive from the lessors all moneys collected from insurance, as the work of
27 rebuilding progressed, in the same manner and in same amounts as when buildings were first built. The lessors to have the right to pay to the lessees the value of the buildings and determine or continue the lease at the expiration of the term, as they might elect, and so on indefinitely at the expiration of each five years.

But when the lessors should elect to determine the lease at the expiration of any five years, they were to pay to the lessee the value of the buildings within thirty days after appraisal; the lessee to repay to the lessors the twelve thousand ($12,000) dollars within ten days after notice of the determination of the lease; intending (as the lease states) that in the event of the final or any determinatian of the lease that the agreements therein should be the basis of settlement between the parties. The lease contained the usual covenants against assignments by lessee without the written assent of lessors, and for forfeiture of lease for nonpayment of rent, and for breach of any other covenants.

It also appears in evidence from said proofs of loss that said McKay had also effected insurance on said ten dwellings in his own name for two thousand five hundred dollars, which policy was outstanding at the time of the fire; and that H. T. Weeks, assignee of said Charles P. McKay, had also effected insurance thereon to the amount of two thousand five hundred dollars.

The plaintiffs then examined as a witness Charles Weeks, whose
28 testimony tended to show that in placing some insurance for Charles P. McKay, as his agent, two or three months before the fire of December 30, 1870, he called on the agents of the defendant in Chicago with a policy for fifteen hundred ($1,500) dollars on a planing-mill in the rear of and adjacent to the buildings in question, running from the defendant to McKay, and asked to have an endorsement written upon it; that the agents informed him, on looking at their books, that they had three thousand ($3,000) dollars insurance on the buildings on the front of the lot, and were carrying too large a line there, and that they must cancel the McKay policy on the planing-mill for that reason; that there was no reflection made upon the character of McKay, or anything of that sort; that the planing-mill had previously gone into the hands of an assignee; that the agents cancelled the McKay policy on the planing-mill for the reason stated by them, viz, that they had too large a risk in that neighborhood to take any more; that the conversation referred to by the witness was held with Mr. Jewell, one of the agents of the defendant.

The plaintiffs then examined as a witness Edwin Jewell, whose testimony tended to show that he was one of the Chicago agents of the defendant in 1870; that his firm, as agents, took the insurance in controversy; that he had a conversation with the witness Weeks after the policy sued upon was issued, as testified by him; that the planing-mill policy to McKay was cancelled only for the reason that they had

too large a line of insurance on property there; that the application for the policy sued upon in this case was made to him (witness) and the property surveyed by him—the application being made by one Whitman; that he (witness) paid no attention to the title to the property, and could not say how the property was held, or who was in possession of it at the time of making the insurance; that at the time he knew nothing of McKay; that he does not remember whether anything was said by Whitman at the time the insurance in question was effected about any other interest in the property insured, except that of the parties named in the policy.

The defendant offered no evidence.

Thereupon the court directed the jury to return a verdict for the plaintiffs for the amount of the policy, with interest thereon from March 9th, 1871, (sixty days after delivery of proofs of loss,) at six per cent. per annum; to which direction and charge of the court the defendant, by its counsel, then and there duly excepted, on the ground that, under the terms and provisions of the policy sued upon, and under the evidence showing that at the time of its issue the interest of the plaintiffs in the property insured was other than the entire, unconditional, and sole ownership thereof, the policy was void, and the plaintiffs, therefore, not entitled to recover upon it.

And the defendant, by its counsel, also then and there duly excepted to said direction and charge of the court, for the further reason
30 that under the terms and provisions of the policy of insurance sued upon, and under the evidence showing that the buildings insured stood upon leased ground when said insurance was effected, the policy was void, and the plaintiffs therefore not entitled to recover upon it.

And thereupon the jury rendered a verdict against the said defendant, upon which judgment was entered by the court.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this its bill of exceptions, and prays that the same may be signed and sealed by the judge of this court; which is done accordingly this second day of April, A. D. 1875.

[SEAL.] H. W. BLODGETT,
Judge.

(Endorsed:) Filed April 30th, 1875. W'm H. Bradley, cl'k.

Appeal-bond.

And on the same day, to wit, the 30th day of April, A. D. 1875, said defendant filed in said clerk's office its bond in appeal in said entitled cause; which said bond is in words and figures following, to wit:

Know all men by these presents, that we, the Lycoming Fire-Insurance Company of Muncy, Pennsylvania, and George P. Tread-
31 way, Simon Quinlin, and James J. Gore are held and firmly bound unto Samuel Rush Haven, Jane S. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, in the full and just sum of seven thousand five hundred dollars, to be paid to the said Samuel Rush Haven, Jane S. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our suc-

cessors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas, lately, in the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between said Samuel Rush Haven, Jane S. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend, as plaintiffs, and said Lycoming Fire-Insurance Company of Muncy, Pennsylvania, as defendants, a judgment was rendered against the said Lycoming Fire-Insurance Company of Muncy, Pennsylvania; and the said Lycoming Fire-Insurance Company of
32 Muncy, Pennsylvania, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Samuel Rush Haven, Jane S. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1875:

Now, the condition of the above obligation is such that if the said Lycoming Fire-Insurance Company of Muncy, Pennsylvania, shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] LYCOMING FIRE-INS. CO.,
JAMES M. BOWMAN, *Sec'y.* [SEAL.]
GEORGE P. TREADWAY. [SEAL.]
CHAPIN AND GORE. [SEAL.]
SIMON QUINLIN. [SEAL.]
JAMES J. GORE. [SEAL.]

Approved:

H. W. BLODGETT,
Judge.

(Endorsed:) Filed April 30, 1875. W'm H. Bradley, cl'k.

33 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Samuel Rush Haven et al. are the plaintiffs and the Lycoming Fire-Insurance Company of Muncy, Pennsylvania, is the defendant, as the same appears from the records of said court, now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, at Chicago, in said district, this 22d day of June, A. D. 1875, and of our Independence the 99th year.

[SEAL.] W'M H. BRADLEY,
Clerk.

34 THE UNITED STATES OF AMERICA, *ss:*

To Samuel Rush Haven, Jane H. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, Adeline Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Lycoming Fire-Insurance Company of Muncy, Pennsylvania, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry W. Blodgett, acting judge, this thirtieth day of April, A. D. 1875.

H. W. BLODGETT,
Judge.

Received a copy of the foregoing citation this 14th day of May, A. D. 1875.

HERVEY, ANTHONY & GALT,
Attorney for Defendants in Error.

(Indorsed:) Haven et al. v. Lycoming Fire-Ins. Co. of Muncy, Pennsylvania. Citation.

35 UNITED STATES OF AMERICA, *sct.:*

The United States of America to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Samuel Rush Haven, Jane S. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, and Frederick B. Stowell, by Samuel R. Haven, his next friend, plaintiffs, and the Lycoming Fire-Insurance Company of Muncy, Pennsylvania, defendant, a manifest error hath happened, to the great damage of the said Lycoming Fire-Insurance Company of Muncy, Pennsylvania, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error
36 what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the twenty-sixth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] WM H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Indorsed:) Supreme Court of the United States. Samuel R. Haven et al. vs. Lycoming Fire-Insurance Co. of Muncy, Pa. Writ of error.

(Indorsement on cover:) No. 110. The Lycoming Fire-Insurance Company of Muncy, Pennsylvania, plaintiff in error, vs. Samuel R. Haven, Jane S. Haven, George W. Johnson, Mary E. Johnson, S. G. W. Benjamin, Clara Benjamin, Edward L. Stowell, John Roper, and F. B. Stowell, by S. R. Haven, his next friend. N. Illinois C. C. U. S. Filed 7th September, 1875.

SUPREME COURT

OF THE UNITED STATES.

THE LYCOMING FIRE INSURANCE COMPANY OF MUNCY, PENNSYLVANIA, *Plaintiff in Error*,

vs.

SAMUEL R. HAVEN, ET. AL., *Defendants in Error.*

Error from U. S. Circuit Court, Northern District of Illinois.

BRIEF AND ARGUMENT.

PHILADELPHIA BAR ASSOCIATION

LAWRENCE PROTHONOT,

For Plaintiff in Error.

STATEMENT OF CASE.

On the 9th day of May, 1870, Plaintiff in Error issued a Policy of Insurance to Jane S. Haven, Mary E. Johnson, Clara Benjamin, Edward L. Stowell, Adeline Stowell, Frederick B. Stowell and S. R. Haven, Agent, insuring the said parties, for the term of one year from date, in the sum of $3,000.00, being $300 on each of ten buildings, known as numbers 538 to 556 South Clark Street, in the City of Chicago. The Policy was in the usual form of policies issued by plaintiff in error, (see Record. p. 23), and provided that if the interest of the assured in the property be any other than the entire, unconditional and sole ownership, for the use and benefit of the insured, or if the buildings insured stand on leased ground, it must be so represented to the Company, and so expressed in the written part of the policy, otherwise the policy shall be void. It further provided that the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and endorsed on the policy, should not be construed as a waiver of any printed or written condition or restriction therein; also that the policy was made and accepted in reference to the foregoing terms and conditions, which are declared to be a part of the contract, and to be used and resorted to in order to determine the rights and obligations of the parties to the policy.

On the 30th day of December, 1870, the buildings insured by said policy were totally destroyed by fire.

Defendants in error presented proofs of loss in due form and in proper time, and stated in said proofs that the said pro-

perty so insured belonged to them, subject to the interest of one Chas. P. McKay, as shown by a contract or lease recorded in the Recorder's Office of Cook County, Ills. (describing it). This was the first intimation that plaintiffs in error had, that any party other than the defendants in error had, or claimed to have, any interest in said buildings; nothing was expressed in the written part of the policy, indicating, or tending to indicate that the interest of the assured in said property was any other than the entire, unconditional and sole ownership of the same, or that the buildings so insured stood on leased ground, and it is not claimed by the assured, that any such information had ever before the fire been imparted to plaintiff in error.

On examination of the lease referred to in the proofs of loss, (see Record, p. 25), plaintiff in error ascertained that the assured were owners in fee of the ground on which the buildings stood, but that they had leased said ground for a term of ten years from November 21st, 1867, to said Charles P. McKay, he McKay, by the terms of the lease, having erected said buildings at a cost of $24,000 for the lessor, and the assured having contributed toward such erection in sums of $1,000 from time to time, to the aggregate sum of $12,000.

The lease provided that McKay should keep the buildings insured during the continuance of the lease in the name and for the benefit of the lessors, in insurance companies to be approved by lessors, in a sum not less than $13,000, and to deposit the policies with lessors. By the terms of the lease, also, McKay was to pay the lessors for the use of the land the sum of $3,588 per annum, and all taxes and assessments for the first five years, and the sum of $5,976.00 per annum, and all taxes and assess-

ments for the second five years, and in addition thereto, McKay was to pay to lessors ten per cent. per annum on the $12,000 advanced by them to him to erect the buildings as aforesaid. The lease further provides, that at any time the lessors could call for an appraisement of the buildings, and if found to be less in value than $24,000, they could either determine the lease and pay McKay the difference between the appraised value and $12,000 and take possession, or require McKay within six months after such appraisal to increase the value of the buildings to $24,000, or they would be entitled to declare a forfeiture of the lease and all of McKay's rights and interests thereunder.

The lease further provides, that in case of fire, McKay should rebuild buildings of the value of $24,000, and should receive from the lessors all moneys collected from insurance on the old buildings, such moneys to be put into such new buildings as they progressed, the lessors to have the right to pay McKay the value of the building and determine or continue the lease at the expiration of the term of five years, as they might elect, and so on indefinitely at the expiration of each five years; that when the lessors should elect to determine the lease at the expiration of any five years, they were to pay McKay the value of the buildings within thirty days after appraisal, McKay to repay to the lessors the $12,000 within ten days after notice of the determination of the lease, intending (as the lease states) that in the event of the final, or any determination of the lease, the agreements therein should be the basis of settlement between the parties.

The lease also contains the usual covenants against assignment by the lessee without the written assent of the lessors, and for forfeiture of lease for non-payment of rent or for breach of any other covenants.

In the proofs of loss furnished by the defendants in error, it is alleged that said McKay had also effected insurance in his own name for $2,500 on said buildings, which policy was outstanding at the time of the fire, and also that one H. T. Weeks, assignee of said McKay, had effected insurance thereon to the amount of $2,500, of all of which facts plaintiff in error was ignorant until so informed by the said proofs of loss.

Under this state of facts plaintiff in error refused to pay the loss as claimed by the defendants in error under said policy.

ASSIGNMENT OF ERRORS.

1st. The Court erred in instructing the jury, and in directing them to return a verdict for the plaintiff below for the amount of the policy and interest; and it is claimed that the evidence did not warrant such an instruction.

2d. The law of the case on the evidence was with the defendant below, and the Court erred in directing the jury to find for the plaintiff below.

3d. The Court erred in not submitting to the jury the question of fact whether the plaintiff below was so far the sole, entire and unconditional owner of the property insured, at the time of the insurance, as to be entitled to recover under the proof and evidence; and the Court trenched upon the province of the jury when it instructed them to find for the plaintiff below.

The policy of insurance, providing, as it did, that if the ownership was any other than sole, entire, and unconditional in the assured, or if the buildings stood upon leased ground, it must be so represented to the Company and so written in the policy, otherwise the policy would be void, the evidence introduced did not sustain a right of recovery in the plaintiff below, under those provisions of the policy.

4th. The Court erred in over-ruling the motion for a new trial (Record p. 21) and entering judgment on verdict.

POINTS AND AUTHORITIES FOR PLAINTIFF IN ERROR.

Plaintiff in error claims that the evidence introduced by the defendants in error themselves, to wit., the policy of insurance, the proofs of loss, and the contract or lease to McKay, clearly show that they had no right to a recovery against the plaintiff in error in this case, under said policy, and that the Court erred in instructing the jury (Record, p. 29), under that evidence, to bring in a verdict for the defendants in error, for the reason, that under the terms and provisions of said policy of insurance, and under the evidence showing that the buildings insured stood upon leased ground when said insurance was effected, the policy was void.

"The land, at the time the policy was issued, was subject to a lease for ten years to McKay, who had built on it the ten houses insured, and McKay was in possession of them and receiving the rents.

"A lease is a conveyance; it passes an interest; and a leasehold estate may be mortgaged and sold on execution."

Taylor's Landlord & Tenant, Sec. 14, *p.* 10.

"It is an actual interest in real estate; a chattle real at common law, falling under the definition of real estate.

Griffin et. al. vs. Marine Co. 52 *Ills.* 138.

"A lessor on ground rent who has entered for arrears under a covenant, is only the possessor of a qualified interest in the premises."

Miltenberger vs. Beacon, 9 *Barr* (*Penn.*) 198.

"The Estate of a Lessee for years is called a term because its outline is limited and determined: It is perfected only by the entry of the lessee, for before the time fixed for entry the whole estate remains in the lessor, and the lessee has strictly no estate in the land, but merely a right thereto, etc. After the period fixed for the commencement of the lease the lessee's interest is still called an *interesse termini*, and although he cannot maintain trespass, if he is not actually in possession, he may maintain an action of ejectment, and has such an estate as may be resisted by an adverse entry; and though this interest will neither merge nor can be surrendered, because until entry the lessee's estate is not a reversion, yet the title will have passed from the lessor to the lessee. The lessee may enter at any time, etc., and after entry he becomes absolute owner of the premises for the term granted, the instrument taking effect from the time of its execution.

Taylor's Landlord & Tenant, Sec. 15.

The defendants in error, therefore, had merely a reversionary interest, having conveyed the ownership to the lessees; they had no right to the possession and no power by law to enforce any such alleged right; yet they claim and represented to us that they were the *sole, entire and unconditioned* owners of the premises.

AS TO REPRESENTATIONS OF ASSURED.

"If the insured is required by the express terms and conditions of the policy to state the particulars of his title, he should do it fully and correctly, or the insurer will not be bound by it."

Henmans vs. Hartford F. Ins. Co. 36 *Wis.* 166.
Columbian Ins. Co. vs. Lawrence, 2 *Peters* 25.

Penn. Ins. Co. vs. Gottman, 48 *Penn.* 156.
Smith vs. Empire Ins. Co. 25 *Bar.* 503.
Birmingham vs. Empire Ins. Co. 42 *Bar.* 459.

"Although the suppression should happen through mistake without any fraudulent intention, yet still the Underwriter is deceived, and the policy is void because the risk run is vastly different from the risk understood and intended to be run at the time of the agreement."

Columbian Ins. Co. vs. Lawrence, 10 *Peter* 515.
Carter vs. Boehm 3 *Bur.* 1905.
Fowler vs. Etna Ins. Co. 6 *Cowan*, 676.
Wilbur vs. Bowditch Ins. Co. 10 *Cushing* 446.

That the existence of this Lease, and the facts relating to it, is a matter material to the risk, and should have been disclosed to Plaintiff in error at the time of applying for the policy, is fully sustained in

Gahahan vs. Union Ins. Co. 43 *N. H.* 177.
Atlantic Ins. Co. vs. Wright, 22 *Ills.* 474.
Warren vs. Middlesex Ins. Co. 21 *Conn.* 261.
Smith vs. Columbia Ins. Co. 5 *Harris* 261.
Columbian Ins. Co. vs. Lawrence 10 *Peters* 516.

If the estate of the insured be less than a title in fee simple, that fact should be disclosed, and cause its true nature to be inserted in the policy; if it be a fee simple estate, they should not consider it a hardship to be required to prove it; the representation ought always to be fair, and omit nothing which is material for the insurer to know, as the extent of the assured's interest in the real estate is always considered by the insurers in taking or rejecting the risk, and in estimating the premium, and affords them an opportunity of judging how far the insured may be engaged or interested in guarding the property insured

against loss, or may be induced to be careless, in order to convert their interests into money.

Ills. M. F. Ins. Co. vs. *Marseilles Ins. Co.*, 1 *Gilman*, 267.

Columbian Ins. Co., vs. *Lawrence*, 10 *Peters*, 515, 516.

These premises had passed out of the possession of the defendants in eoror, the lessee was in possession, and by the terms of the lease, the lessee was to keep them insured for the lessors, and they being thus secured for the $12,000 which they had loaned to the lessee, were not interested in guarding the property insured against loss, and we were therefore left as insurers of parties whom we did not know, and knowing, may have refused to insure.

In the case of the *Reaper Ins. Co.* vs. *Brennan*, 58 Ills. 158, the facts were that at the time of effecting the insurance the property had been sold on a judgment and execution against the assured, but the twelve months allowed for redemption had not expired. Held, that by virtue of the clause in the policy that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership thereof, for the use and benefit of the insured, it must be so represented to the Company, and so expresed in the written part of the policy, otherwise the policy shall be void; it was a valid defence under the policy, and that the title of the assured was not entire, unconditional and sole.

In the case of *Jeffries* vs. *Life Ins. Co.*, 22d *Wallace*, p. 56, where the assured made false answers to questions put to him by the Company, at the time he applied for insurance, it was claimed that such false statements, which *did not* relate to the

risk, did not necessarily avoid the policy, unless they influenced the mind of the Company; and that, whether they were material, was a question for the jury; the Court says, "We know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability, that the statements and declarations made in the application are true, and when the truth of such statements form the basis of the contract."

The term owner, or ownership, as applied to land, means a fee simple estate.

Now, what were the facts when the assured represented to the Company that the interest of the assured was *entire, unconditional* and *sole.*

Admitting that the words "interest" and "title" are not synonomous, the words here state what the interest must be, viz: *entire, unconditional* and *sole.*

But here there was a ground lease; the lessee was in possession; he had $12,000 of his own money in the property; he was at any time liable to a forfeiture; he was to pay interest on $12,000 more to the lessors at ten per cent per annum; so long as he kept good his covenants he was entitled to the possession; he must rebuild in case of fire, and was entitled to the insurance money as he rebuilt (Record, p. 27.)

The lease, it is true, provides that the buildings shall be erected for the party of the first part; but a mere phrase injected into the middle of a lease, wholly negatived by its other provisions, is of no value.

The question is, upon whom would the loss fall if the property burned? This $12,000 advanced by the lessor was a loan, for

the lessee pays interest at 10 per cent., and must pay the loan back in ten days, even if the lessor determined the lease. (Record p. 27.)

If the sole unconditional and entire ownership of the buildings was in the lessor why does the lease provide (Record p. 27) that if the lessors elect to determine the lease at the expiration of any five years, they are to pay to the lessee the value of the buildings within thirty days after appraisal? Surely it cannot be claimed that the sole, entire and unconditional ownership is in the lessors, if, upon certain contingencies, in order to get possession, they must pay the value of the buildings to the lessee.

The evidence shows (Record p. 27) that the lessee, McKay also insured himself as owner of these buildings in the sum of $2,500, which policy was outstanding at the time of the fire. It also shows that McKay made an assignment, and H. T. Weeks, his assignee, also effected insurance to the amount of $2,500.

In the cases of *Columbian Ins. Co.* vs. *Lawrence*, 2 *Peters*, 25 *and* 10 *Peters* 507, it is held by this Court that the nature and extent of the interest insured are material to the risk, and must be represented truly to the insurer.

We claim that the ownership of these buildings was in McKay, as shown by the terms of the lease, but we had no notice of such ownership, nor of McKay's subsequent assignment to Weeks, until after the fire occurred. Under the terms of the policy, in which we have insured the defendants in error, are we also to be compelled to insure parties who are strangers to us so far as this contract is concerned? While we were willing to take the risk of insuring the defendants in error, who were solvent, are we to be compelled

to insure the insolvent McKay and his assignee? Surely this is material to the risk, for the suppression of this information deprived us of our right to protect ourselves against the insolvent McKay by the cancellation of the policy, if we had elected so to do.

It was argued and insisted for the defendants in error in the court below, that the fee simple in these buildings was in them, because they were the owners in fee of the ground on which they stood, but in this case the lease under which these buildings were built, shows conclusively that they were not owned in fee by them, and provides how, and under what circumstances, and how much money they shall pay to McKay in order to get an estate in fee simple on said buildings.

If (as reasoned by his Honor, *Mr. Chief Justice Marshall*, in the case of *Columbian Ins. Co.* vs. *Lawrence*, 2 *Peters* 48) the defendants in error had proceeded to sell this property as theirs; should describe it in the contract as belonging to them, no court would have compelled the purchaser to take the title they could have made.

The lease we would respectfully submit, is an extraordinary document, but if carefully examined, we think that the explanation and intention of it is clear. The defendants in error leased the ground to McKay for a term of years; McKay not having funds sufficient for the purpose of building, the defendant in error, in order to secure themselves in the receipt of the agreed rent for the ground, and having money on hand, which they wanted to loan at the rate of 10 per cent. interest, loaned him that sum to assist him in the building, and so far as this amount was concerned the lease operated as a chattel mortgage upon the buildings given by McKay, the owner of the same, to the defendants in error.

The mere fact that the fee in the ground is in the lessor does not necessarily give him a title in fee to the buildings, which may be erected on it. The ownership of the buildings placed on leased ground is to be determined by the terms and conditions of the lease. Put them, the strongest construction that can be put in favor of the defendants in error, on the question of ownership. They loaned McKay $12,000 to put into the buildings, and McKay put $12,000 of his own money into them; now, which of these parties owns the buildings? It certainly cannot be claimed by either that *he* is the *sole, entire* and *unconditional* owner, for neither party has a better right than the other to claim such ownership, yet they both insure themselves as owners.

In the case of *Morgan Ave.* vs. *Hamilton F. Ins. Co.*, 10 *Bosworth, p.* 545, and *Wynn Ave.* vs. *Exchange Fire Ins. Co.*, 9 *Bosworth*, 431, in both of which questions arose as to the right of lessor of ground to insure in self as owner of buildings erected by lessee, it was held that the provisions of the lease as regards ownership must govern, and that at the expiration of the leases, the lessor had an insurable interest, it being a condition of the leases, that at their expiration the buildings were to be the property of the lessor.

The law on the question of liability of insurers where the ownership is not as represented by the assured, is fully laid down in the cases above cited of the *Commonwealth Ins. Co.* vs. *Lawrence*, 2 *Peters*, 25 *and* 10 *Peters* 515, and *Carpenter* vs. *The Washington Ins. Co.*, 16 *Peters* 505, and we claim that it is conclusive on the points involved in this case.

All of which is respectfully submitted.

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SUPREME COURT

OF THE UNITED STATES.

THE LYCOMING FIRE INSURANCE
COMPANY OF MUNCY, PENNSYLVANIA,
Plaintiff in Error.

vs.

SAMUEL R. HAVEN, *et al.*,
Defendants in Error.

Error from U. S. Circuit Court.

NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument.

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Error from U. S. Circuit Court Northern District of Illinois.

BRIEF AND ARGUMENT.

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BRIEF AND ARGUMENT.

This was an action brought by the defendants in error against the plaintiff in error in the Circuit Court of the United States for the Northern District of Illinois, on an insurance policy. Judgment was entered for defendants in error below for $3,730, and plaintiff in error brings the case here, and assigns as the only error, that the insurance policy was void, because it provided that if the interest of the assured in the property was any other than the entire unconditional and sole ownership, for the use and benefit of the insured, or if the buildings insured stand on leased ground, and the same was not represented to the company, and so expressed in the written part of the policy, then the policy was void.

The plaintiff in error assumes, that the interest of the defendants in error in the property was not such as the above clause in the policy required, and that the buildings

were on leased ground. The counsel for the plaintiff in error imagines a state of facts, (in which he is not supported by the facts stated in the record), and then endeavors to show, that if the facts were as he imagines in regard to the ownership of this property, then the policy of insurance by reason of said clause about the ownership of said property was void.

There was no evidence offered at the trial below, and there is none in the record showing or tending to show that the defendants in error were not the entire, unconditional and sole owners of said property. The plaintiff in error offered no testimony of any kind. The defendants in error, although they were not bound to prove it, showed at the trial that they were the entire, unconditional and sole owners, both of the land and the buildings on the same. There was no conflict of evidence on that point or any other, hence the court did not err in directing the jury to find for the defendants in error.

The record shows that the defendants in error were the entire, unconditional and sole owners of said property. On page 11 of printed transcript of record, 23 of record, will be found the following:

"It was admitted that the plaintiffs were the owners in fee of the land on which the buildings insured stood."

It does not need any authority to prove that a fee simple estate is the highest estate in land known to the law. Then, if the defendants in error were the owners in fee simple of the land on which these buildings stood, they were the entire, unconditional and sole owners of the said land.

Further, we submit that it is well settled law that the owner of land, in the absence of any proof to the contrary, is pre-

sumed to be the owner of any buildings erected on the same; that the buildings enter into and become a part of the land, and the buildings and land together are known as real estate, and under whatever title the land is held, the buildings are held under the same title. And the defendants in error being the owners in fee of the land would also be owners in fee of the buildings—that is the entire, unconditional and sole owners of the buildings.

But the record does not compel us to establish this title to the buildings by presumption. On page 12 of printed transcript, 24 of record is found the following:

"The plaintiffs (defendants in error) then offered and "read in evidence to the jury the contract referred to in "the proof of loss, being a lease of the land and the build- "ings and improvements to be built thereon, as therein- "after agreed upon and described, on which the insured "buildings were situated, from the plaintiffs (defendants "in error) as owners of the ground to one Charles P. "McKay."

There is nothing in this clause of the lease to show that the defendants in error were not the sole and entire and unconditional owners of these buildings; on the contrary, they, as the owners of the land, leased the land and the buildings to be erected to said McKay.

Again, on page 12 of printed transcript, 25 and 26 of record, will be found the following:

"By the terms of this contract, the lessee agreed in the words of the contract to at once proceed to erect ten buildings on the land described therein to cost not less than twenty-four thousand ($24,000) dollars for the party of the

first part, lessor (defendants in error) and to receive pay for the same at the times and in the manner therein described."

There is nothing in this part of the lease to show that the defendants in error did not own these buildings, on the contrary, the buildings, by the terms of the lease, were erected for the defendants in error, and paid for by them.

Again, as showing that the defendants in error were the owners of these buildings, the lessee by the lease bound himself to insure them during the process of erection in the name and for the benefit of the defendants in error, and to deposit the policies with them. All prudent men who are paying out money for buildings in the process of erection require this. Page 12 of printed record, 26 of record, has the following: "The lessee agreed to insure "the premises during the process of erection of the build- "ings, and to keep them insured for at least thirteen "thousand dollars during the continuance of the lease in "the name and for the benefit of the lessors (defendants in "error) in insurance companies to be approved by them, "and to deposit the policies with them."

The plaintiff in error has nothing but this lease to base its claim that the defendants in error were not the owners of these buildings, and we submit that this lease throughout shows that the defendants in error owned the land, contracted to have the buildings put up for them, always owned them, and treated them as their own, and had them insured as their own. There was no effort on the part of the defendant in error to conceal the state of the title, this lease of the land and buildings to be erected was made on November 21st, 1867, and was recorded in the Recorder's office of Cook County, (printed record page 12) was on

record in May, 1870, when this policy was written by the plaintiff in error; it was mentioned in the proofs of loss made by the defendants in error. Everything done by the defendants in error was in good faith, misrepresenting nothing and concealing nothing.

The argument of the plaintiff in error proceeds on the assumption that the ownership of the land was in certain persons, the defendants in error, and the buildings were owned by McKay. But the assumption is contrary to the facts. McKay no more owned these buildings than the lessees of most of the business houses in cities own the buildings. These business houses in cities, ground and buildings, are leased to occupants for varying terms of years, and the possession turned over to them, but the owners, notwithstanding these leases, take out insurance on the buildings, and never mention the lessees in the policies, and no insurance company, till the plaintiff in error, ever thought of claiming that by virtue of such leases the owners ceased to be the entire and sole owners of the buildings.

Where the lessee of a piece of ground puts up a building for himself and owns the building himself, and then takes out such a policy in the name of the owner of the ground, that would be such a case as the plaintiff in error has constructed to do battle against, and has expended a good deal of labor and ingenuity in showing that such a policy would be void. The record does not present such a case, and we deem it unnecessary to answer an argument framed to meet such a state of facts. The authorities cited by the plaintiff in error on the questions of misrepresentations, and suppression of facts of the assured, we have not examined, as there is no evidence in the record that the assured made

any representations to or concealments of facts from the plaintiff in error.

In Gahahan *vs.* Union Ins. Co. 43, N. H. 177, and in Warner *vs.* Middlesex Ins. Co., 21 Conn. 444, (this last case is misquoted in brief of plaintiff in error), cited by plaintiff in error, are cases where the assured represented that the property insured was free and unincumbered, when in fact it was not.

In Atlantic Ins. Co. *vs.* Wright, 22 Ill., 474, cited by plaintiff in error is a case where the assured had only a leasehold interest in the property, and insured it as owner.

In Smith *vs.* Columbia Ins. Co., 5 Harris, 261, cited by plaintiff in error in a case where a mortgagee's interest was insured, and there were prior mortgages on the property which the assured did not disclose.

In Columbian Ins. Co. *vs.* Lawrence, 10 Peters 516, cited by plaintiff in error, is where assured misrepresented facts.

In the Ills. M. F. Ins. Co. *vs.* Marseilles Ins. Co., 1 Gilman 267, the assured did not own the fee in the property insured.

In the case of the Reaper Ins. Co. *vs.* Brennan, 58 Ills 158, cited by plaintiff in error, the assured had only an equity of redemption in the property insured, which he did not disclose. The policy in that case, in addition to what plaintiff in error has quoted of it, provided that it the interest of the assured was only an equity of redemption and he did not disclose it, the policy should be void.

In the case of Jeffries *vs.* Life Ins. Co. 225 Wallace 56, was where the assured made false answers to questions put to him when the property was insured.

We submit that all of the above cases cited by the plaintiff in error were decided upon a state of facts widely different from the facts in this case, and have no application.

In two cases, Mayor, &c., *vs.* Hamilton F. Ins. Co., 10 Bosworth 545, and Mayor, &c, *vs.* Exchange Fire Ins. Co., 9 Bosworth 434, cited by plaintiff in error on the last page of his brief, both hold that the provisions of the lease as regards ownership must govern, and we submit that the lease referred to in this case states emphatically that the ownership of the buildings was in defendants in error, for the land belonged to them and the buildings were built for them.

We find no cases where the assured owned both the ground and the buildings, and leased the same for a term of years, in which it was held by any court, that by virtue of such a lease given, the owner ceased to be the sole, entire and unconditional owner of the premises. The ownership under such circumstances seems never to have been questioned. The plaintiff in error occupies the position of a pioneer on the question.

There are a number of cases where, under policies of insurance containing similar clauses about ownerships, the assured has taken out policies on property covered by mortgages, without disclosing the mortgages, and the courts have held that that did not vitiate the policy—that notwithstanding the mortgages on the property, the assured was still the absolute owner of the property. We cite two cases out of many, viz:

Washington Fire Ins. Co. vs. Kelly, 32 Md., 421.
Hubbard vs. Hartford Fire Ins. Co., 33 Iowa, 325.

If the owner, with his property mortgaged, is still the absolute owner of the property, much more is he the entire, sole and unconditional owner of property, although he may have leased it for a term of years.

We submit there is no error in the record. The total loss was admitted, the proofs of loss were acknowledged to be satisfactory; no dispute about the amount of recovery, and no objection made to the recovery, except that defendants were not the entire, sole and unconditional owners of the property. There was no proof to sustain this objection. The record abundantly shows the contrary. There was no conflict of testimony. The court did not err in instructing the jury to find for the defendants in error.

We submit the judgment of the court below ought to be affirmed.

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